No. 80-442

In the Supreme Court of the United States

OCTOBER TERM, 1980

BEN F. GARMAN,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY,

Respondent.

BRIEF OF THE NORTHERN TRUST COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEFFREY COLE
DEBBIE S. PINES
180 North LaSalle Street
Suite 3100
Chicago, Illinois 60601
(312) 782-8300

Counsel for Respondent.

November, 1980

QUESTION PRESENTED FOR REVIEW

Whether a federal court of appeals has the power to reverse, without remand for a new trial, a Rule 41(b) dismissal entered on behalf of a defendant where the defendant's testimony given as an adverse witness is inherently incredible and where proper resolution of the case is beyond any doubt.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdictional Statement	2
Constitutional and Statutory Provisions Involved	2
Statement Of The Case	2
Reasons For Denying The Writ	6
Conclusion	18

Appendix:

Opinion and Judgment of Court of Appeals	App. 1
Transcript of Proceedings in the Bankruptcy Court on March 28, 1977	App. 19

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Cases

PAGE

Albaugh v. Pennsylvania R. Co., 120 F.Supp. 70 (D.D.C. 1954, *aff'd*, 219 F.2d 264 (D.C. Cir. 1955) 12

Becker v. Seaboard Finance Co., 436 F.2d 778 (9th Cir. 1970) 10

James Burrough, Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266 (7th Cir. 1966) 13

Continental Bank v. Rock Island Ry., 294 U.S. 648 (1935) 13

Crosby v. Buchanan, 90 U.S. (23 Wall.) 420 (1875) 16

Douglas v. City of Jeanette, 319 U.S. 157 (1942) Jackson, J., dissenting) 17

Factor v. CIR, 281 F.2d 100 (9th Cir. 1960), *cert. denied* 364 U.S. 933 (1962) 12

Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974) 17

Geighy Chemical Corp. v. Allen, 224 F.2d 110 (5th Cir. 1955) 12, 13, 15

Gerdes v. Lustigarten, 266 U.S. 321 (1924) 6

Harris v. New York, 401 U.S. 222 (1971) 17

Haynes v. United States, 390 U.S. 85 (1968) 14

Indiana Metal Products v. NLRB, 442 F.2d 46 (7th Cir. 1971) 12

Kostelac v. United States, 247 F.2d 723 (9th Cir. 1957) 13

Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963) 14

Lochner v. New York, 198 U.S. 45 (1905) 15

PAGE

Magna Sales Co. v. Magna Alloys Research Pty., 545 F.2d 668 (9th Cir. 1977) 13

Marin v. England, 385 U.S. 99 (1966) 13

Morgan Guaranty Trust Co. of New York v. Martin, 466 F.2d 593 (7th Cir. 1972) 17

Orloff v. Willoughby, 345 U.S. 83 (1953) 10

Penn Texas Corp. v. Morse, 242 F.2d 243 (7th Cir. 1957) 12

Peters v. Fitzpatrick, 310 F.2d 704 (7th Cir. 1962) ..12, 13

Quock Ting v. United States, 140 U.S. 417-420 (1891) .. 12

Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975) 15

Singleton v. Wulff, 428 U.S. 121 (1976) 14

Smith v. Dravo Corp., 208 F.2d 388 (7th Cir. 1953) 13

Thomas E. Snyder & Sons v. Industrial Molasses U.S. 685 (1960) 12

Sun Life Assurance Co. of Canada v. Stacks, 187 F.2d 17 (7th Cir. 1951) 12

In Re Trimble, 55 F.2d 165 (8th Cir. 1932) 11

United States v. Zenith, 395 U.S. 100 (1969) 13

Urban Redevelopment Corp. v. CIR, 294 F.2d 328 (4th Cir. 1961) 12

Walder v. United States, 347 U.S. 62 (1954) 17

In Re West, 158 F.2d 858 (7th Cir. 1946) 11

Wong Ken Foon v. Brownell, 218 F. 2d 444 (9th Cir. 1955) 12

Yunker v. CIR, 256 F.2d 130 (6th Cir. 1958) 13

Constitution, Statutes and Rules

PAGE

Amendment V, Constitution of the United States 4, 17

Bankruptcy Act, 11 U.S.C. §35 U.S.C. §35(a)(2) 2

28 U.S.C. § 2106 .....5, 12, 13, 17

Rule 17, Rules of the Supreme Court of the United States 18

Rule 41(b), Federal Rules of Civil Procedure 4, 7, 15

Rule 52(a), Federal Rules of Civil Procedure 13

Other Authorities

G. Bell, Appellate Court Opinions and the Remand Process, Ga. L. Rev. 526 (1968) 4

J. Cole, Impeachment With Unconstitutionally Obtained Evidence: Coming To Grips With the Perjurous Defendant, 62 Nw. J. C. L. & CRIM. 1 (1971) .. 17

5 J. Moore, Federal Practice §41.13[2] at 41-185 (2d ed. 1980) 14

Note, Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making, 81 Harv. L. Rev. 1260 (1968) 5

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-442

BEN F. GARMAN,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY,

Respondent.

BRIEF OF THE NORTHERN TRUST COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The as yet unreported opinion of the United States Court of Appeals for the Seventh Circuit was entered on April 29, 1980. We have reproduced the opinion of the court as an Appendix ("App.") to this brief. *See* App. at 1 through 18, *infra.* The memorandum decision of the United States District Court for the Northern District of Illinois is unreported and is appended to the petition for a writ of certiorari at 21 through 31. The bankruptcy judge for the United States District Court for the Northern District of Illinois did not issue a formal opinion.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is sought to be predicated upon 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V, Constitution of the United States:

   "No person shall be . . . deprived of life, liberty, or property without due process of law. . . ."

2. Rule 41(b), Federal Rules of Civil Procedure:

   "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

3. 28 U.S.C. §2106:

   "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE

In early 1975, Mr. Ben Garman ("Garman") filed a voluntary petition in bankruptcy in which he listed a $30,000.00 debt to The Northern Trust Company of Chicago ("the Northern") as an unsecured claim to be discharged. Pursuant to §17(a)(2) of the Bankruptcy Act,[1]

---

[1] *See* 11 U.S.C. §35(a)(2).

the Northern filed a complaint to prevent the discharge of this debt on the ground that in granting the loans and renewals it had relied upon materially false and fraudulent written financial statements submitted to it by Mr. Garman.

Following a plenary trial on the issue of dischargeability, the bankruptcy judge held, on March 28, 1977, that the reliance of the Northern was not "reasonable" and dismissed the Northern's complaint. Thereafter, the Northern appealed to the United States District Court for the Northern District of Illinois which held the case for two years before affirming the dismissal on April 6, 1979.[2]

On April 29, 1980, a unanimous panel of the United States Court of Appeals for the Seventh Circuit reversed this judgment.[3] The carefully drafted opinion held, *inter alia,* that reasonableness of reliance under §17(a)(2) of the Bankruptcy Act is not an essential element of a plaintiff's case.[4] The court of appeals expressly reserved for another day resolution of the question of whether §523 of the 1978 Bankruptcy Act will be subject to the same interpretation. *See* App. at 7, n. 6.

After a meticulous review of the record, the court of appeals found that the testimony of Mr. Garman regarding the reasons for his having omitted $50,000.00 in lia-

---

[2] The Northern was somehow not notified of the decision and thereafter, inexplicably, the files in the case could not be found in the Clerk's office. As a result, the Northern was forced to obtain permission from the Seventh Circuit to reconstruct the entire record. *See* "Motion of the Northern Trust Company to Reconstruct the Record" (June 14, 1979).

[3] The decision of the Seventh Circuit is appended as an Appendix, at 1-18.

[4] The Petition for Certiorari ("the Petition") does not challenge the validity of this aspect of the Seventh Circuit's decision.

bilities from his various financial statements was "inherently incredible." "[D]iscern[ing] no reason for further extending the life of this litigation," (App. at 18), the court reversed and remanded with instructions that judgment be entered in favor of the Northern.

Following this decision, the petitioner applied to the Seventh Circuit for a rehearing *en banc*. That request was denied without a single dissenting vote. Subsequently, the petitioner moved for issuance of an order staying the mandate in order that he might apply for a writ of *certiorari*. That motion was likewise denied without a single dissenting vote.

The Petition posits that the decision of the court of appeals reversing without remand for a new trial has abridged Mr. Garman's rights under the Due Process Clause of the Fifth Amendment and under Rule 41(b) of the Federal Rules of Civil Procedure. *See* Petition at 5-11. In what follows, we shall demonstrate that the decision of the court of appeals and its disposition of the case were indisputably correct. We shall demonstrate that the decision is not an aberration which has created a conflict among the circuits, but that, on the contrary, the decision is consonant with decisions of every other circuit court of appeals that has been called upon to decide a case with comparable contours.

More than a decade ago, Judge Griffin Bell recognized that "the manner in which an appellate court performs its remand function may go far to lessen the expense and delay in litigation." G. Bell, *Appellate Court Opinions and the Remand Process*, 2 Ga. L. Rev. 526, 537 (1968). "Crowded court dockets and an expanding population accent the need for new and inventive methods and for courts to address their attention to improvements in procedure."

Id. at 527. *Cf.*, Note, *Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making*, 81 Harv. L. Rev. 1260 (1968). These principles underlie the extraordinarily broad authority vested in federal appellate courts by 28 U.S.C. §2106.[5]

The court of appeals' disposition of the instant case is faithful to the spirit of §2106 and must not be altered by any action of this Court. To do so would be to allow individuals insentive to the basic concepts of truth and honor to play ducks and drakes with the resources of the federal courts.

---

[5] Section 2106 provides that:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

REASONS FOR DENYING THE WRIT

At the close of its opinion, the Court of Appeals stated:

"Having thus determined that a reversal is necessary, our only remaining question concerns what course further judicial attention to this case should take. We have already set forth that the elements adverted to in *Gerdes* [*v. Lustigarten,* 266 U.S. 321 (1924)] exist without dispute in the record of this case. The remaining question is the matter of "intent to deceive." We find guidance in *Carini, supra,* 592 F.2d at 380:

> In addition, the courts require a showing of fraudulent intent or moral turpitude on the part of the debtor, i.e., an intent to deceive. . . . These questions of knowing or reckless falsehood and intent to deceive are questions of fact, . . . and the bankruptcy court's findings on those issues are conclusive unless clearly erroneous. . . . (Citations omitted.)

"Here, of course, we are not aided by a finding on this question of fact. Nevertheless, in view of the inherent incredibility of Garman's testimony, which we have previously noted, the continuing omissions in the context of the representations of completeness in the financial statements, in the words of *Carini, supra* at 380, "were grossly reckless at a minimum . . . Indeed, where, as here, a person knowingly or recklessly makes a false representation which the person knows or should know, will induce another to make a loan, intent to deceive may logically be inferred." *Id.* Here, we discern no reason for further extending the life of this litigation.

"Accordingly, the judgment of the district court is reversed and the cause is remanded for the entry of a judgment in favor of the Northern Trust Company.

Costs will be assessed against the defendant." (App. at 18).[6]

Garman contends that reversal without remand for a new trial was improper and deprived him of his right to present any evidence on the question of whether he intended to deceive the Northern Trust. (Petition at 3; 11). This contention puts out of view all the facts of the case, distorts the purposes underlying Rule 41(b) of the Federal Rules of Civil Procedure, and ignores the broad discretionary remand authority possessed by the federal courts of appeals.

A.

After carefully reviewing Garman's lengthy trial testimony regarding the reason why he failed to list approximately $50,000 in debts on the various financial statements he submitted to the Northern, the court of appeals was left "with the firm conviction that not only was Garman an evasive witness, but that his testimony was inherently incredible." (App. at 4). The validity of the court's characterization of Garman's conduct and his testimony is scarcely open to doubt. Indeed, a review of the testimony reveals that the court's characterization was, if anything, overly kind.

Testifying as an adverse witness at trial, Garman admitted that he owed the Northern $30,000 and that he had not recorded the approximately $50,000 in claims against him reflected on Schedule A-3 filed by Garman in the Bankruptcy Court.[7] That sworn Schedule is captioned

---

[6] This disposition of the case was consistent with our prayer for relief in the court of appeals. (Brief For The Northern Trust Company at 43; Reply Brief For The Northern Trust Company at 17).

[7] The specific claims are set forth in the opinion at n.2 *See* App. at 2.

"Creditors Having Unsecured Claims Without Priority." (Northern's App. at 19).

Under examination at trial, both by his own counsel and by counsel for the Northern, Garman, "was a student of semantics", (App. at 5), sought to explain the reasons for these glaring omissions with the incredible contention that the Northern's form of Personal Financial Statement only called for the revelation of "debts or *liabilities*"[8] not of *"claims"* as required by Schedule A-3.[9]

The mendacity of this testimony is beyond dispute. Schedule A-3 states at the bottom "[t]hat none of the foregoing *indebtedness,* listed above are contingent, liquidated or disputed unless otherwise stated." And this Schedule also requires that the bankrupt list the "[n]ame of *creditor.*" and date the "claim was *incurred"* and "if evidenced by a *judgment.*" Surely, these words could not possibly convey to a "sophisticated businessman" (App. at 9) and a "student of semantics" that the information required on Schedule A-3 differed from that required by the Northern's form of personal financial statement. Garman's logomachy was clearly nothing more than a transparent evasion, and the court so found.[10]

---

[8] *See* App. at 4-5.

[9] *See* Northern App. at 19. Garman testified that even though Schedule A-3 clearly reflected certain *"debts"* incurred between November, 1973 and February, 1975, he could not state what "debts" or "liabilities" were incurred by him in this period since the Schedule referred to "claims" while the questions asked spoke of *debts and liabilities.* The disingenuousness of this testimony was thoroughly explored by the court of appeals. *See* App. at 4-6.

[10] Garman's semantic punctiliousness at trial was of somewhat recent origin. During his deposition, Garman agreed with the characterization of the matters in Schedule A-3 as debts and obligations. The reliance on meaningless semantic distinctions exhibited by Garman is not, of course, without precedent. But where it has

(footnote continued)

Garman further testified that he advised individuals listed on Schedule A-3, all of whom were close friends, as to investments in the stock market.[11] For this advice, Garman was paid the fees shown as "counselling fees" on his financial statements. If there were gains, Garman was to share in the gains; in the event of losses, Garman would share in the losses. However, in the event that the stock became worthless, Garman, at trial, claimed he would not have any liability whatsoever. (App. at 6).

This testimony was wholly at odds with Garman's deposition testimony where, in laboring to explain why the "claims" on Schedule A-3 were omitted from his financial statements, Garman contended that he "would assume any losses at the rate of a hundred percent," (Record 15, at 8; 10-11; 13; 18) but that there was no "liability" unless and until the stocks went to zero. (Record 15, at 13; 18). Garman characterized these claims as "potential liabilities." (Record 13, at 119).[12]

(footnote continued)
occurred, it has been as resoundingly rejected by other courts as it was in this case. *See, e.g.,* Haimowich v. Mandel, 243 F. 338, 340 (3rd Cir. 1971) (bankrupt explained the falsity in his financial statement by saying that he thought he was asked to give only his "*accounts* payable" and not his "*bills* payable.") (Emphasis in original). Not surprisingly, the Third Circuit rejected this explanation.)

---

[11] Garman admitted that there were no written agreements evidencing these arrangements.

[12] Contrary to some faint suggestion to the contrary (*see* Petition at 4, n.3 this deposition was used at the trial and was made, *without objection*, part of the Record on Appeal in the Seventh Circuit. Moreover, despite *extensive* references to and citation from the deposition in our brief on the merits in the court of appeals as well as in our brief in opposition to the request for a rehearing *en banc,* the petition uttered not a whisper of protest. Rather, it sought to overcome the devastating nature of this impeaching testimony by ignoring it.

It is obvious that the "student of semantics" came to realize that continued allegiance to his deposition testimony would render his obligations "contingent liabilities" and thus includable under that specific heading on the Northern's Personal Financial Statement. Hence, Garman at trial "changed positions as numbly as if dancing a quadrille," *Orloff* v. *Willoughby,* 345 U.S. 83, 87 (1953).

The decision of the court of appeals recognized that this was not a case in which an unsophisticated borrower was duped by an unscrupulous lender. Indeed, the record makes abundantly clear that, there were discussions between Garman and the Northern Trust at the time the various statements were submitted. Thus Mr. Bishop testified how, on December 9, 1970, when he approved the $5,000 loan to Garman, he examined in detail the written personal financial statement dated December 8, 1970, supplied by Garman. (Record 13, at 25-28). *Bishop told Garman the purpose of the statement and what the financial statement had to include.* (Record 13, at 72). Mr. Bishop also stated that when the Bank made the $4,000 loan to Garman, he relied upon Garman's written personal financial statement dated December 8, 1970. A day

---

[13] Garman did admit that the $5000.00 claim of one Kenneth Stoen reflected on Schedule A-3 was incurred in 1978 and that this was a "liability" not shown on the financial statements he submitted to the Northern. (App. at 6). He sought to explain this omission on the ground it was offset by stock which *"I own for* Kenneth Stoen." (Record at 112) (Emphasis supplied). Apart from the fact that this explanation is not adequate, *Cf.,* Becker v. Seaboard Finance Co., 436 F.2d 778 (9th Cir. 1970); In Re Feldman, 86 F.2d 495 (7th Cir. 1936), this testimony is belied by ¶6 of the "Statement of Affairs For Bankrupt" in which Garman stated under oath that he did not hold property for anyone.

or two before that loan was granted, *Mr. Bishop had inquired of Garman if there had been any material change in his financial position since the date the December 8, 1970 financial statement was submitted to the Bank. Garman told Bishop there had been no change.* (Record 13, at 28-32). In addition, Bishop testified that he told Garman to submit to the Bank an undated and current financial statement, which Garman did the next day on December 22, 1971. *Id.*

Bishop further testified that on September 5, 1972, when he approved a $10,000 loan to Garman, he relied upon Garman's most recent written financial statement on file with the Bank, which was dated December 22, 1971. *On this occasion Bishop again inquired of Garman as to whether there had been any change in his financial condition, and Garman again told Bishop that there had been no change since he had given the Bank the December 22, 1971 financial statement.* (Record 13, at 32-33).[14]

On January 15, 1973, Mr. Bishop approved a $15,000 loan to Garman. In making the decision to loan Garman this amount, Mr. Bishop relied on Garman's personal financial statement dated December 22, 1971. *At the time of this loan, Garman once again informed Bishop that the financial statement of 12/22/71 was as complete and accurate a representation of his financial condition as it was when he had first presented that statement to the Bank.* In addition, Bishop testified that on this occasion he told Garman to give the bank a current financial statement, which Garman did on February 27, 1973. (Record 13, at 33-34; 63).

Despite the fact that Garman was examined in detail and without impediment by his own counsel at trial, he never contradicted any of Bishop's testimony!

---

[14] These false statements are, of course, highly significant. *See* In Re West, 158 F.2d 858 (7th Cir. 1946); In Re Trimble, 55 F.2d 165, 166 (8th Cir. 1932).

B.

In light of this testimony, the Seventh Circuit manifestly was warranted in its finding that the testimony of Garman was "inherently incredible." And, in light of this testimony and the posture of the entire case, the court's disposition of the case was the only one that was "just under the circumstances." 28 U.S.C. §2106.[15]

> " 'If there be any one thing in the administration of law upon which the decisions, the texts, and the general opinion of bench and bar are in agreement, it is that evidence which is inherently unbelievable or incredible is in effect no evidence. * * * Courts are not required to believe that which . . . they judicially know to be incredible. . . .' " *Geighy Chemical Corp.* v. *Allen,* 224 F.2d 110, 114, n.5 (5th Cir. 1955).[16]

This principle is equally applicable to appellate review and disposition of cases under appropriate circumstances.

---

[15] §2106 provides that:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

[16] *Accord* Quock Ting v. United States, 140 U.S. 417-420 (1891); Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971); Peters v. Fitzpatrick, 310 F.2d 704 (7th Cir. 1962); Urban Redevelopment Corp. v. CIR, 294 F.2d 328, 332 (4th Cir. 1961); Factor v. CIR, 281 F.2d 100 (9th Cir. 1960), *cert. denied,* 364 U.S. 933 (1962); Thomas E. Snyder & Sons v. Industrial Mollasses Corp., 270 F.2d 875 (7th Cir. 1959); Penn Texas Corp. v. Morse, 242 F.2d 243, 247 (7th Cir. 1957); Wong Ken Foon v. Brownell, 218 F.2d 444, 446 (9th Cir. 1955); Sun Life Assurance Co. of Canada v. Stacks, 187 F.2d 17, 20 (7th Cir. 1951); Albaugh v. Pennsylvania R.R. Co., 120 F.Supp. 70, 73 (D. D.C. 1954), *aff'd,* 219 F.2d 764 (D.C. Cir. 1955).

See e.g., Peters v. *Fitzpatrick,* 310 F.2d 704 (7th Cir. 1962); *Geigy Chemical Corp.* v. *Allen,* 224 F.2d 110, 114 (5th Cir. 1955). Thus, where, as here, evidentiary facts are not in dispute, a court of appeals can make its own findings without the necessity for remand for further proceedings. *See e.g., Magna Sales Co.* v. *Magna Alloys Research Pty.,* 545 F.2d 668, 671 (9th Cir. 1977); *Yunker* v. *CIR,* 256 F.2d 130, 133 (6th Cir. 1958); *Kostelac* v. *United States,* 247 F.2d 723, 726 (9th Cir. 1957).[17] The Seventh Circuit in *Smith* v. *Dravo Corp.,* 208 F.2d 388 (7th Cir. 1953), relying on 28 U.S.C. 2106, phrased the matter thusly:

> "Ordinarily, as to issues upon which no findings have been made, the court will reverse with directions to make findings and conclusions, but in equity, [18] where the record is complete or the evidence uncontradicted or entirely documentary, the appellate court is bound to decide the case so far as it is in condition to be decided, and direct such a decree as under all the circumstances may be proper." *Id.* at 391.

---

[17] Since the bankruptcy judge made no finding of fact regarding Garman's intent, neither Rule 52(a) of the Federal Rules of Civil Procedure nor United States v. Zenith, 395 U.S. 100 (1969) have any relevancy. (*See* Petition at 9). Zenith's statement that Courts of Appeals should avoid deciding factual issues *de novo* was made with reference to appellate review of factual findings under Rule 52; it is manifestly irrelevant to the very different question of a Court of Appeals' scope of review and remand authority in the *absence* of an explicit finding. Equally inapplicable is the Petition's reference to James Burrough, Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266 (7th Cir. 1966) (Petition at 9). The most casual reading of page 273, *et seq.* of that opinion reveals why remand in that case was appropriate.

[18] Bankruptcy courts "are essentially courts of equity, and their proceedings inherently proceedings in equity. . . ." Continental Bank v. Rock Island R.R., 294 U.S. 648, 675 (1935). *Accord* Marin v. England, 385 U.S. 99, 103 (1966).

Finally, the disposition of this case by the Seventh Circuit accords with the course championed by Professor Moore:

> "On the other hand, it may not always be necessary for an appellate court upon reversal to direct a trial. For example, where the trial court grants defendant's motion to dismiss, but fails to enter Rule 52(a) findings as required by Rule 41(b), a remand may be required only for this limited purpose. In some instances, no further proceedings may be necessary other than the entry of judgment for the plaintiff. Where the facts are not disputed or where defendant has presented all his evidence upon being called as a witness for the plaintiff the appellate court upon reversal of a dismissal may properly direct the district court to enter judgment for the plaintiff." 5 J. Moore, Federal Practice, ¶41.13[2] at 41-185 (2d Ed. 1980) (footnotes omitted).

No one even remotely familiar with the singular history of this litigation, *see supra* at n.2, and the irrefragible proof of Garman's criminality fairly could suggest that the court of appeals erred in "discern[ing] no reason for further extending the life of this litigation." (App. at 18). Rather, this is one of those cases presenting "circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.'" *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). *Cf., Haynes* v. *United States*, 390 U.S. 85, 100-01 (1968). *See also Kosty* v. *Lewis*, 319 F.2d 744, 749 (D.C. Cir. 1963).

The cases cited at pages 9 through 11 of the Petition are not to the contrary. They merely enunciate the general proposition that a reversal of a judgment improperly dismissing a complaint at the close of a plaintiff's case-in-chief must be remanded for trial in order that the defen-

dant can present his case. However, since "general propositions do not decide concrete cases," *Lochner* v. *New York,* 198 U.S. 45, 74 (1905) (Holmes, J., dissenting), there must be a more critical analysis of those authorities and their applicability here than the petitioner has been willing to undertake.

In each of the cases cited in the Petition, absent a remand, the defendant would have been deprived of the opportunity to present any evidence in opposition to that offered by the plaintiff and thus would have been deprived of his "day in court." A review of the record demonstrates that no comparable situation exists here.

In none of the cases cited in the Petition did the defendant offer any evidence or did he testify regarding the crucial elements not only of the plaintiff's case but his own defense as well.[19] Here, Garman was called as an adverse witness by the Northern. During his "direct" examination, he admitted that the various financial statements he submitted to the Northern between 1970 and 1973 failed to include some $50,000 in debts and claims which were listed on the sworn schedules filed in the Bankruptcy

---

[19] With all deference, we fail to perceive the reason for the petition's reliance on Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975). Riegel Fiber Corp. most surely does not support the proposition that "where one of the defendants testify [sic] as an adverse witness, the defendants still have a right to offer their evidence should the dismissal order be reversed." (Petition at 9). The only question presented in that case was the extent of the evidence the *plaintiff* would be allowed to present following a reversal of an improperly granted Rule 41(b) dismissal entered in favor of the defendant. The Fifth Circuit's opinion did not pretend to deal with the very different questions presented in this case. Properly read, the Fifth Circuit's decision in *Riegel Fiber Corp.* is not contrary to its decision in *Geighy Chemical Corp.* v. *Allen,* discussed *supra* at 12.

Court. During his "direct" examination and later during the unobstructed examination by his own counsel, Garman testified regarding his intent in providing these statements to the Northern and the reasons for the omissions in the statements. It was this explanation which the court of appeals found to be inherently incredible as a matter of law.

C.

It has been rightly said that "[i]n a court of conscience deliberate concealment is equivalent to deliberate falsehood." *Crosby* v. *Buchanan,* 90 U.S. (23 Wall.) 420, 454 (1875). Measured against this standard, the presentation of the petitioner does not fare too well. Indeed, in certain respects, the Petition is as disingenuous as was the trial testimony itself. For example, the Petition states that as a result of the dismissal of the Northern's complaint at the close of its case, Garman never presented "any of its [sic] own evidence," even though there were some twenty exhibits which Garman would have used had he had the opportunity. (Petition at 3, n.2; 11).

There are two essential difficulties with this tantalizing statement. First, neither in this Court nor in his presentation to the court of appeals has there ever been the slightest attempt to explicate the nature of this mysterious "evidence." Instead, there is only Garman's insidious *ipse dixit* that, despite the five and one half year pendency of this case, he has been deprived of his "day in court."

Second, and more importantly, the contention ignores the events which transpired at trial. However, "[u]nless we are to reach judgments as did Plato's men who were chained in a cave so that they saw nothing but shadows, we should consider the facts of this case at least as a hypothesis to test the validity of the conclusions. . . ."

Douglas v. *City of Jeanette,* 319 U.S. 157, 166 (1942) (Jackson, J., dissenting).

Of the twenty defense exhibits, half were documents dated between January, 1962 and 1968. (App. at 21-22). The balance bore dates between 1970 and 1973. (*Id.*) The bulk of these documents consisted merely of credit advices, the actual demand notes, out-of-date financial statements, promissory notes, letters to Garman demanding payment, and letters from Garman declining to pay. *Id.* Quite apart from the manifest irrelevancy of these exhibits to the critical questions in the case, Garman's attorney used these exhibits extensively, and without restriction, during his cross examination of the Northern's witnesses (*see* App. at 22-44). It is thus rather illegitimate to suggest that the action of the court of appeals prevented Garman from having that full and fair hearing that the Fifth Amendment requires. (Petition at 3; 11).

Given the inherently incredible nature of this testimony and the indisputable nature of the balance of the Northern's case, the court of appeals refused to further prolong, unnecessarily, the litigation. In essence, the Panel correctly perceived that only by "modifying his version of the facts" on remand could Garman hope to prevail. *See Fisher* v. *Volz,* 496 F.2d 333, 349, n.2 (3d Cir. 1974). This, neither the imperative of judicial integrity[20] nor the salutary purposes underlying 28 U.S.C. §2106 will allow. *See Fisher* v. *Volz, supra. Compare Morgan Guaranty Trust Co. of New York* v. *Martin,* 466 F.2d 593, 600 (7th Cir. 1972).

---

[20] *Compare* Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954); J. Cole, Impeachment With Unconstitutionally Obtained Evidence: Coming To Grips With The Perjurous Defendant, 62 Nw. J. C. L. & CRIM. 1 (1971).

CONCLUSION

Rule 17 of the Rules of this Court provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Among the reasons which will justify granting of the writ is the issuance of a decision by a federal court of appeals which is in conflict with decisions of other circuits on the same subject or which "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for and exercise of this Court's power of supervision." Only literary perversity or jaundiced partisanship could suggest that either of these criteria for review has been met in the instant case.

Wherefore, for the foregoing reasons, The Northern Trust Company respectfully requests that the Petition For A Writ of Certiorari be denied.

Respectfully submitted,

JEFFREY COLE
DEBBIE S. PINES
180 North LaSalle Street
Suite 3100
Chicago, Illinois 60601
(312) 782-8300

Counsel for Respondent

APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1631

IN THE MATTER OF: BEN GARMAN, Bankrupt.
THE NORTHERN TRUST COMPANY,

Plaintiff-Appellant,

v.

BEN F. GARMAN,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75 B 1111

HUBERT L. WILL, *Judge.*

Argued February 19, 1980—Decided April 29, 1980

Before CASTLE, *Senior Circuit Judge,* PELL and TONE, *Circuit Judges.*

PELL, *Circuit Judge.* Section 17(a)(2) of the Bankruptcy Act of 1938, 11 U.S.C. § 35(a)(2), provides that an individual's debt shall not be discharged in bankruptcy if that debt or its renewal is the result of money obtained "in reliance [by the creditor] upon a materially false statement in writing respecting [the debtor's] financial

condition made or published . . . with intent to deceive. . . ." This appeal calls upon us to decide, *inter alia*, whether non-dischargeability is appropriate only where the creditor's reliance under § 17(a)(2) is "reasonable."

Ben F. Garman, the bankrupt, a life insurance salesman, had been a customer of the Northern Trust Bank (Northern) in Chicago since 1962. Between December, 1970, and March, 1973, Garman borrowed various sums from the Northern resulting in a total indebtedness on November 1, 1973, of $30,000. On that date, Garman executed a renewal note to the Northern for the entire outstanding amount.

There is direct and unimpeached testimony in the record that the Northern, at least in part, expressly relied upon three financial statements submitted by Garman in making these loans.[1] It is uncontested by Garman that these statements omitted listing approximately $50,000 in "claims" that Garman later listed in his petition for bankruptcy.[2] These claims, however, are recorded as hav-

---

[1] There is no requirement that the creditor place exclusive reliance on the financial statement. Partial reliance is sufficient. *See Carini* v. *Matera*, 592 F.2d 378 (7th Cir. 1979); *Cunningham* v. *Elco Distributors*, 189 F.2d 87 (6th Cir. 1951).

[2] Garman's transactions with the Northern can be summarized in the following schedule:

	Date	Amount	Date of statement relied upon	Amount of claims omitted
1.	12/ 9/70	$5,000 (loan)	12/ 8/70	$49,800
2.	12/21/71	$4,000 (loan)	12/ 8/70	$49,800
3.	9 /5/72	$7,500 (loan) $2,500 (renewal)	12/22/71	$51,170
4.	1/15/73	$15,000 loan)	12/22/71	$51,170
5.	3/ 2/73	$5,000 (loan)	2/27/73	$51,170
6.	11/ 1/73	$30,000 (renewal)	2/27/73	$51,170

ing arisen prior to the time Garman filed the statements with the Northern. Had these amounts been included as potential liabilities in the statements, they would have substantially reduced Garman's net worth, in some instances to less than zero.

Upon Garman's failure to pay the $30,000 when due in April of 1974, the Northern filed suit against him for this amount in state court. On February 6, 1975, prior to judgment in the state court, Garman filed a voluntary petition in bankruptcy listing as unsecured claims to be discharged the $30,000 debt to the Northern as well as the $50,000 in claims not listed on his financial statements. The Northern filed a complaint to prevent the discharge of the $30,000 debt pursuant to § 17(a)(2), and a hearing was held on the issue before a bankruptcy judge on March 28 and 29, 1977. At the hearing, the Northern introduced the testimony of Charles S. Bishop, a Northern vice-president, who had approved most of the loans to Garman, and Carol King, a loan officer who had approved the November 1, 1973 renewal, regarding their reliance on the Garman statements.[3] The Northern also introduced the various notes and statements signed by Garman. Each financial statement provided that it was "a true and complete statement of my financial condition, and details relating thereto. . . . I agree that if any material change occurs I will immediately notify you, unless you are so notified you may continue to rely upon the statement hereon given." Bishop

---

[3] Although King, unlike Bishop, did not specifically state that she had "relied" upon Garman's filed statements when approving the renewal, she did state she had "reviewed" the statements and Garman's credit file as a whole prior to granting her approval. Her reliance on the statements, which at the very least was a partial basis of her decisions, is implicit in her testimony.

testified that had he known of the $50,000 in claims omitted from the statements, he would not have made the loans.

Garman, testifying as an adverse witness, conceded that he had failed to list the $50,000 in claims on the financial statement, but maintained that the omission did not render the statements false. Our examination of his testimony leaves us with the firm conviction that not only was Garman an evasive witness, but that his testimony was inherently incredible. A few illustrations are sufficient to demonstrate our conclusion. One of the creditors listed on Schedule A-3 of the bankruptcy petition was a Dr. Solomon with the claim stated as being approximately $10,800. Garman's attention was directed to the statement at the bottom of the page of Schedule A-3 that "none of the foregoing indebtedness, listed above, are contingent, liquidated or disputed, unless otherwise stated." When asked about the debt to Solomon which had been listed in the schedule without qualification, Garman responded, "[Y]ou keep referring to a debt. We are talking about unsecured claims. I am not talking about any debt." This was followed by an assertion that when he "signed that statement [he] did not acknowledge that was a debt." The record does not indicate whether he was referring here to the bankruptcy schedule or to the financial statement. Either interpretation, however, would fail of verity. If he was referring to the schedule, it clearly refers to "indebtedness." On the other hand, if he was referring to the financial statements, which were signed in the early 1970's, the Solomon claim was not listed although on the schedule he listed it as having been incurred in October, 1968. When asked specifically about listing this item on the financial statements, he said, "It talks about contingent liabilities, sir. I did not have a contingent liability at that time." When the Solomon matter was pursued further, this non-illuminating colloquy followed:

Q. I will rephrase the question.

Mr. Garman, in examining the financial statements marked as Plaintiff's Exhibit Nos. 2, 4, and 7, could you tell me if, reflected on any one of those financial statements, is this claim of Dr. Solomon that is reflected on any one of those three financial statements?

A. I'm sorry, I can't answer the question.

I find the discrepancy between claim and liability. This is talking about a liability and this is talking about a claim.

Q. You are not answering my question.

A. I can't answer your question.

THE COURT: That is an answer.

The statement that he could not answer the question was repeated with regard to another item of indebtedness listed on the bankruptcy schedule as having been incurred in February, 1972, even though he was being shown a subsequent-in-time financial statement which clearly did not include the debt. On subsequent references to the financial statements, Garman admitted that items were not listed there but did appear on the bankruptcy schedule, including a $4,000 indebtedness to another bank resulting from the various loans extended over the past five years, and a promissory note to an estate for $5,000 which related back to January, 1968.

Professing that he was "a student of semantics," Garman periodically stated that he could not answer questions, stating on one occasion, "[Y]ou ask me about debts, on the other hand, you are talking about claims." When examined by his own counsel, Garman, in significant candor, related that it had been made clear to him when he was filing in bankruptcy that possible claims should be listed because once he had filed he could not go back and claim that he had forgotten them. His concern about not having possible claims discharged in bankruptcy did not extend

to an equal disclosure when he was borrowing money from Northern. Garman further testified that the unlisted items on the financial statements were not legal documents, they were just informal agreements, and that he did not feel that the word "debt" did "justice to what was involved here as the listing of a claim." The gist of his testimony with regard to a substantial amount of the unlisted items was that Garman would purchase, or would recommend purchase, of certain investments which would be bought with money from friends, and he would share in 50% of the gains but would be responsible for 100% of the losses. He testified he did not consider these as "debts" although he did concede that the $5,000 promissory note, which was also unlisted on the financial statements, was an exception. In sum, while he considered that he had to list all possible claims on the bankruptcy schedule, he felt no similar compulsion on the financial statements even though an answer was required on "other contingent liabilities." As early as 1970, however, he was aware of this part of the statement because he listed a contingent liability of $37,000 as an endorser on notes. Subsequent statements listed no contingent liabilities.

At the conclusion of the hearing, the bankruptcy judge issued no written findings and made no oral findings regarding the materiality of the omissions in the statements or Garman's intent when he filed the statements. Rather, the bankruptcy judge held that the Northern had failed to establish its entitlement to nondischarge of Garman's debt to it because it had not proved it had "reasonably relied" upon the statements. Although the bankruptcy judge's statements do not make clear whether he was basing his decision on a finding of no actual reliance or of no reasonable reliance, the district court on appeal held, correctly we believe, that "it is clear that the bankruptcy

judge's dismissal was predicated upon his findings of no reasonable reliance.'"[4] The district judge then affirmed the bankruptcy court stating: "In addition to the requirement that the creditor actually relied, it is clear that § 35 (a)(2) requires that the creditor's reliance must have been reasonable." Viewing what it held to be a finding of fact by the bankruptcy judge, the district court held that the finding that the Northern could not have reasonably relied upon these statements was not "clearly erroneous."

Initially, we note that § 17(a)(2), unlike its successor,[5] does not by its terms require a showing of "reasonable reliance" and requires only a showing of reliance in fact.[6] Nevertheless, Garman relies upon a number of decisions ostensibly requiring a showing of reasonableness. *Carini* v. *Matera,* 592 F.2d 378 (7th Cir. 1979); *Kentile Floors, Inc.* v. *Winham,* 440 F.2d 1128 (9th Cir. 1971); *In re: Smith,* 424 F.Supp. 858 (M.D. La. 1976); *In re: Adams,* 368 F.Supp. 80 (D.S.D. 1973); *Sweet* v. *Ritter Finance Co.,*

---

[4] As noted above, Bishop's testimony that he actually relied on the statement in making the loans was direct and unimpeached, and the bankruptcy judge stated "there is no reason to doubt anything that Mr. Bishop stated in answer to the questions in my opinion.

[5] Section 523(a)(2)(B) of the Bankruptcy Act of 1978 provides, in relevant part:

> A discharge under . . . this title does not discharge an individual debtor from any debt—for obtaining money . . . or an extension [or] renewal, by—use of a statement in writing—(i) that is materially false; (ii) respecting the debtor's . . . financial condition; (iii) on which the creditor to whom the debtor is liable for obtaining such money . . . or credit *reasonably* relied; and (iv) that the debtor caused to be made or published with intent to deceive. . . . (Emphasis added.)

[6] Whether the new § 523 will be subject to the same interpretation we apply today to § 17(a)(2) is a question that will have to await another day for resolution.

263 F.Supp. 540 (W.D. Va. 1967); *In re: Disbrow,* 20 Colliers Bankr. Cases, 1149 (D. Ver. 1979); *In re: Ducote,* 4 Bankr. Ct. Dec. 943 (W.D. La. 1978); *In re: Gibbs,* 9 Colliers Bankr. Cases, 608 (M.D. Fla. 1976); *In re: Arden,* 2 Bankr. Ct. Dec. 204 (D.R.I. 1975); *Cash Finance Service, Inc.* v. *Haisch,* 173 So.2d 851 (La. Ct. App. 1965). We believe, however, Garman misinterprets these cases in arguing that they bar the Northern's requested relief.

Although some of the mentioned cases do, in fact, refer to "reasonable" or justifiable reliance as a requirement under § 17(a)(2), they do not require the court, as was done in the present case, to undertake a subjective evaluation and judgment of a creditor's lending policy and practices. These cases simply stand for the proposition that reasonableness is circumstantial evidence of actual reliance; that is, dischargeability shall not be denied where a creditor's claimed "reliance" on a "financial statement" would be *so* unreasonable as not to be actual reliance at all. The opinions relied upon either state this directly, *e.g., Smith, and see Adams* and *Sweet,* or the lack of actual reliance was implicit in the record. In *Arden,* for example, the court held that the creditor knew the alleged misrepresentation was false at the time the loan was made and therefore could not have "reasonably" relied on the "misrepresentation." The court's decision to allow discharge, furthermore, was based upon its holding that the creditor had failed to prove the debtor's intent to defraud. In *Sweet,* one debtor, the husband, could neither read nor write except to sign his name on the statement filled out and signed by his wife. The entire transaction was completed in "no more than two minutes" and the creditor, although charging 30% interest on a portion of the amounts lent, never asked any questions concerning the listed assets or liabilities. The court noted the creditor

was simply "taking advantage of a borrower's ignorance" and held that indications that the creditor was well aware of the unsound financial condition of the debtor yet exercised an "almost studied disregard for the truth . . . is enough in most instances to preclude a later claim by the loan company that is reliance on the false financial statement was reasonable." 263 F.Supp. at 542. In *Kentile Floors,* and *Disbrow,* as in *Sweet,* the creditor possessed information that conflicted with the apparent financial well-being portrayed on the debtor's financial statement. In *Cash Finance,* the statement was all but illegible and the court found that it was "obvious" that the list of debts in the statement was incomplete. In *Ducote,* the money was transferred to the debtor at the same time the first financial statement was submitted, thus indicating that "the loan had already been approved when [the debtor] filed the signed financial statement." 4 Bankr. Ct. Dec. at 944. *See also Gibbs and Sweet, supra.* In *Smith* and *Gibbs,* the debtor was a total stranger to the lender and the "financial statement," which was "nothing more than a typewritten statement on the stationery of the company whose financial status they purported to represent," *id.* at 862, was unsigned by the debtor. In *Carini,* this court simply stated, "And, of course, such reliance must be reasonable" while affirming the district court's finding of reasonable reliance. 592 F.2d at 381.

These cases present factual circumstances far different from the one before us here. Garman, the debtor, was a sophisticated businessman who had a long-standing and apparently successful business relationship with the Northern for many years prior to his default. *See, Carini,* at 381. The financial statements he signed did not on their faces indicate the presence of any material misrepresentations or omissions, showed his net worth well in excess

of the loaned amount, and affirmatively required him to notify the Northern in the event of any material change in his financial condition. *Compare, Disbrow.* Furthermore, the Northern had no information indicating that anything stated in the financial statements might be materially false.[7] In sum, there are no facts presented suggesting that the Northern utilized the financial statement simply as a "perfunctory device to be used to contest discharge, and not used to be relied thereon," 1A Colliers on Bankruptcy. ¶ 17.16 at 1636 n.17 (14th ed., 1979), was simply "burying its commercial head in the sand," *Arden, supra,* at 207, or that the Northern's reliance on the financial statements was so unreasonable as not to be actual reliance at all.

Garman protests, however, that to allow Northern to bar discharge in this case would defeat the well-established principle that the Bankruptcy Act "ultimately favors the debtor who invokes its protection." *In re: Schmelzer,* 350 F.Supp. 429, 435 (S.D. Ohio 1972), *aff'd,* 480 F.2d 1074 (6th Cir. 1973). This would be true, of course, in every case where discharge is denied, yet this has failed to preclude the denial of discharge in cases where § 17(a)(2) applied. We believe the Act was meant to discharge only the *honest* debtor from his debts, *Williams* v. *United States*

---

[7] Although it is true Garman was in default on at least one of the loans at the time of the November 1, 1973 renewal, this does not necessarily indicate that the financial statement misrepresented his financial condition. This fact might well indicate that it was a poor business decision to grant the renewal at that time in that Garman apparently would be required to sell assets to repay his debt. *See* discussion in text, *infra.* However, whether or not it was a poor business decision is not the proper inquiry. Rather, the proper inquiry is whether the claimed reliance on the financial statement accurately to portray Garman's net worth in excess of the debt was so unreasonable as not to be reliance in fact.

Fidelity & Guaranty Co., 236 U.S. 549, 555 (1915), and that the Act should be liberally applied to protect the bankrupt only in those cases where there is no intent to violate its provisions. *In re: Schwartz*, 133 F.2d 216, 217 (7th Cir. 1943); *Cunningham* v. *Elco Distributors*, 189 F.2d 87, 89 (6th Cir. 1951). As was stated by the Supreme Court in *Bruning* v. *United States*, 376 U.S. 358, 361 (1964):

> . . . petitioner [is not] aided by the now familiar principle that one main purpose of the Bankruptcy Act is to let the honest debtor begin his financial life anew. As the Court of Appeals noted, § 17 is not a compassionate section for debtors. Rather, it demonstrates congressional judgment that certain problems . . . override the value of giving debtors a wholly fresh start. (Footnote omitted.)

See also United States v. *Sotelo*, 436 U.S. 268, 278-79 (1977).

The bankruptcy and district judges' analyses of the present case, in fact, illustrate the very problems potentially arising from their interpretation of the above mentioned cases. Indeed, their analyses did not address whether the Northern's reliance *on the statements* was reasonable. Rather, they expressed their judgment on whether the decision *to loan Garman the money* was reasonable.[8] They did not hold that the financial statements

---

[8] An excerpt from the transcript of the bankruptcy hearing is indicative:

> The Court: The way I look at reliance if you rely on a piece of paper then it has to be that you are able to make a proper business decision.
>
> * * *
>
> What if I think the person who relied on [the statement] is a complete fool?
>
> * * *

(footnote continued)

showing Garman's net worth in excess of the loaned amount was inherently unreliable; rather, they were concerned by the fact that the Northern would have based its decision to lend money on the net worth and nature of the assets of the debtor rather than the debtor's income.[9] However, it is not the court's duty under § 17(a)(2) to

---

(footnote continued)

Mr. Webb (Northern's counsel): . . . Therefore, there is no question that the financial statement was relied upon. Now whether or not she should have relied upon it is the question your honor is asking?

The Court: Yes . . . I say that is *bad judgment.*

* * *

Mr. Webb: But the bank did rely upon it.

The Court: Then I fault their judgment. I fault their reliance . . . and I think that is bad judgment if they relied upon this, even partially relied upon this.

* * *

The Court: The statement dated 2/27/73 does not justify the renewal or extension of credit to Mr. Garman of $30,000. . . . *It is just bad business conduct.*

* * *

The Court: I find it difficult to impose on Mr. Garman the responsibility of the bank's actions in making these loans where I believe that the various statements supposedly relied upon [by] the bank do not warrant in the court's opinion the extension of the credit. . . . (Emphasis added.)

[9] At one point the bankruptcy judge stated:

Then I look to the financial statement and I say how can anyone look at this personal financial statement . . . which is the one dated February 27, and say on April 30, 1974 [the due date of the renewal note] Ben F. Garman will be able to pay $30,000.

* * *

(footnote continued)

second guess a creditor's decision to make a loan or to set loan policy for the creditor. If a lender chooses to let net worth rather than income be the determinative factor in loan decisions, it is not for the court to say that this is bad business policy requiring discharge of the resulting debt in bankruptcy. The present issue for the court is simply whether the bankrupt obtained credit, or a renewal, through the creditor's reliance on a materially false financial statement containing information apparently sufficient to obtain an accurate picture of the debtor's financial condition with regard to a reasonable decisional factor in the loan decision, filed by the debtor with the intent to deceive the creditor. The creditor need establish only its reliance in fact, although its claims to reliance cannot be so unreasonable as to defeat a finding of reliance in fact. Given this reliance, the court, with the benefit of hindsight, should not base its decision regarding discharge on whether *it* would have extended the loan. In the present case, the Northern's financial statement form requested sufficient information to obtain an accurate picture of the debtor's net worth, a reasonable decisional factor in the loan decision. To say the Northern should have looked to Garman's income flow instead of net worth is irrelevant to the § 17(a)(2) issues.

(footnote continued)

> Where is he going to get that money? He has $80,000 in—he is not going to sell his house. His cash in the bank, what is he going to do with that? He will keep that. He has life insurance cash value. Okay. On the back of it he says he has a loan of $5,000. Will he get another loan? All right, there is $5,000. He has a car. Is he going to sell his car? His coin collection. Are we going to ask him to sell his coin collection? He probably will not.
>
> A lot, $20,000. I do not know what that lot is, whether it is a new home or an old home.

The bankruptcy and district judges were also concerned, however, with the fact that at the time the final renewal was granted on November 1, 1973, the most recent financial statement was more than seven months old. We also note that prior loans were granted in reliance upon financial statements that were slightly more than a year old. Although this fact also may raise questions regarding the business judgment shown in the decision to lend the money, we do not think this time lapse renders Northern's reliance on the statements so unreasonable as not to be reliance in fact. In *Gerdes* v. *Lustgarden,* 266 U.S. 321 (1924), the debtor submitted a financial statement on January 5, 1920, containing, as in the present case, a statement that he would notify the creditor as to any material changes in his financial condition, and that the creditor could continue to rely upon the statement until so notified. Based upon this representation, the creditor, a bank, advanced funds in October and November 1920 and in February of 1921. Upon the debtor's bankruptcy, the bank moved to avoid discharge of the debt pursuant to § 14(b) of the Bankruptcy Act of 1910. The bankruptcy referee allowed the discharge holding that even if the bank had in fact relied upon the statement, "it had no right to so do, since in view of the financial depression prevailing in 1920, the 'reasonable time' for which the statement remained a 'continuing statement' had expired when the credits were extended." 266 U.S. at 324. The district court reversed, finding that the bank had a right to rely upon the statements, but the court of appeals reversed the district court judgment, holding that the lapse of time rendered the bank's reliance unjustified. The Supreme Court reversed the court of appeals, however, stating:

> The only essentials to the statutory bar . . . are (a) that the written statement was made for the purpose of obtaining credit; (b) that it was materially false;

> and (c) that credit was obtained upon it. If these are established, the vice inherent in the original falsity of the statement is not remedied by the lapse of time; and if the creditor extends credit upon such a false statement while it is still in force and binding upon the bankrupt, within the time in which he intended it should serve that end, it does not lie in his mouth to say that by reason of extrinsic circumstances the creditor was unjustified in relying upon it. In short, the lapse of time is only material in determining whether credit was extended within the period intended, while the statement was still binding on the bankrupt, and whether the creditor in fact extended credit upon the faith of the statement.

266 U.S. at 326.

We hold that the same conclusion is appropriate in the present case. Garman clearly filed the financial statements for the purpose of obtaining credit. The financial statements were materially false when they were filed. Finally, the creditor extended credit upon the faith of the statements.

The district and bankruptcy judges were also concerned, however, with the fact that the Northern took no steps to confirm or verify the information Garman set forth in his financial statements. They found, therefore, that any reliance the Northern placed in these statements was unreasonable. In *Carini, supra,* this court faced a similar contention and rejected it, as we do here. *Carini* involved a creditor who had the opportunity to verify the representations of the debtor's solvency made by the debtor in a written statement, and by the debtor's accountant orally. The creditor declined the opportunity "because he and [the debtor] were like brothers, and even had he seen [the verification], he would not have been able to understand [it]." *In re: Matera,* 436 F.Supp. 947, 949 (E.D.

Wis. 1977). Nevertheless, this court affirmed the bankruptcy and district judges' refusal to discharge the debt, stating: "Taking into account . . . the close friendship between the parties, . . . the repetition of the false representations over a six-month span, and the other circumstances prior to the loan, the finding of reasonable reliance is supported by the evidence." 592 F.2d at 381. In the present case, we hold that the failure of the Northern to verify the information contained in Garman's statements was not so unreasonable as to justify a finding that there was no actual reliance. Garman was a longtime customer of the bank and repeated his alleged misrepresentations over a three-year period. The statements themselves contain no information indicating that further investigation may be required, nor is there any allegation that further investigation would have uncovered the great majority of unlisted claims that were attributable to informal and oral arrangements between Garman and his friends. Furthermore, although a creditor is not entitled to rely upon an obviously false representation of the debtor, this does not require him or her to view each representation with incredibility requiring verification. "The law recognizes a duty of each to refrain from even attempted deceit of another with whom he deals and the right of the latter to assume he will do so. . . ." *Jacobsen* v. *Whitley,* 138 Wis. 434, 120 N.W. 285, 286 (1909). Absent any facts reasonably indicating verification was necessary, we are not persuaded that the Northern's failure to verify rendered its reliance so unreasonable as to discharge Garman's debt.

One further point deserves mention. On appeal, the district court affirmed, *inter alia,* the bankruptcy judge's determination that because the November 1, 1973 renewal note extinguished all prior notes signed by Garman, the only circumstances to be evaluated under § 17(a)(2) were

the circumstances surrounding that last renewal. To adopt such a position, however, is to hold that because the Northern failed to discover Garman's misrepresentation at the time of the renewal, all prior alleged misrepresentations by Garman were excused. This we refuse to do. Although the renewal note did, in fact, result in the repayment of the prior notes for bookkeeping purposes, it is clear that in actuality the "renewal" was exactly what its name implies, an extension of the time in which Garman was required to repay the pre-existing debt. Garman's counsel acknowledged this when he conceded at the oral argument that the $30,000 renewal and the prior notes were all part of the same loan transaction.

Similarly, the fact that the November 1, 1973, renewal was initiated by the Northern rather than Garman is irrelevant to the instant issue. The fact remains that Garman signed financial statements stating that they could be relied upon until he informed the Northern otherwise. He cannot avoid liability on these statements simply because the Northern found that renewing the debt rather than immediately seeking its judicial remedies was in its interest. The Northern properly pleaded and appealed its contentions regarding the whole of Garman's outstanding debt, and the district court, therefore, improperly limited its review to only those circumstances surrounding the November 1, 1973 renewal.

Having held that the bankruptcy and district judges applied an improperly stringent legal standard in this case in finding that the Northern's reliance was "unreasonable," and therefore did not justify a bar to discharge, we see no reason to rule upon whether the bankruptcy judge's finding that Northern failed to meet the more stringent standard was to be reviewed under the "clearly erroneous" or some other standard. Our determination turns simply on a question of law.

Having thus determined that a reversal is necessary, our only remaining question concerns what course further judicial attention to this case should take. We have already set forth that the elements adverted to in *Gerdes* exist without dispute in the record of this case. The remaining question is the matter of "intent to deceive." We find guidance in *Carini, supra,* 592 F.2d at 30:

> In addition, the courts require a showing of fraudulent intent or moral turpitude on the part of the debtor, i.e., an intent to deceive. . . . These questions of knowing or reckless falsehood and intent to deceive are questions of fact, . . . and the bankruptcy court's findings on those issues are conclusive unless clearly erroneous. . . . (Citations omitted.)

Here, of course, we are not aided by a finding on this question of fact. Nevertheless, in view of the inherent incredibility of Garman's testimony, which we have previously noted, the continuing omissions in the context of the representations of completeness in the financial statements, in the words of *Carini, supra* at 380, "were grossly reckless at a minimum. . . . Indeed, where, as here, a person knowingly or recklessly makes a false representation which the person knows or should know, will induce another to make a loan, intent to deceive may logically be inferred." *Id.* Here, we discern no reason for further extending the life of this litigation.

Accordingly, the judgment of the district court is reversed and the cause is remanded for the entry of a judgment in favor of the Northern Trust Company. Costs will be assessed against the defendant.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

The Court: Which exhibits are you going to—

Mr. Webb: I will state for the record, your Honor, the exhibits which I intend to use which there is a stipulation as to foundation are: Plaintiff Exhibit Nos. 1, 3, 5, 6, 8, and 9; those are all promissory notes of Northern Trust Company signed by Mr. Garman.

In addition, Plaintiff Exhibit No. 2, Plaintiff Exhibit No. 4, and Plaintiff Exhibit No. 7 are personal financial statements of Mr. Garman filed with the Northern Trust Company.

The only other exhibit I anticipate using, your Honor, is an exhibit I have marked Plaintiff—10 which is, in effect, part of these proceedings. It is a bankruptcy petition which I anticipate using, but the document itself is part of the record before the Court at this time.

The Court: Thank you.

And, as I understand it, Mr. Crane, you stipulate as to the foundation of these various exhibits?

Mr. Crane: Yes, I do.

The Court: What exhibits do you wish to use?

Mr. Crane: Your Honor, the defendant wishes, I think I will have to enumerate them one by one because they are kind of lengthy.

As its Group Exhibit No. 1, all of these documents are copies of documents in the bank's loan or credit file which I got from the plaintiff pursuant to motion to produce, the Defendant's Group Exhibit No. 1 which consists of an interoffice memorandum dated January 12, 1962; a loan memorandum dated January 12, 1962; a letter from the Northern Trust, dated January 15, 1962, to Mr. Hugh Fanning; and an undated memo signed GSS which Mr. Webb would agree appears to be part of that same dated transaction.

Mr. Webb: That is correct.

Mr. Crane: As Defendant's Exhibit No. 2, an interoffice memorandum from the Northern Trust, dated November 27, 1963.

As Defendant's Exhibit No. 3, an interoffice memorandum dated January 21, 1964.

As Defendant's Exhibit No. 4, consisting of two documents, I'm sorry, one document with two notations, a note from Ben Garman, the bankrupt, dated 7/3/64; and a handwritten response, dated 7/8/63, I think there is an error in the date, to that by the bank.

Is that correct, Mr. Webb?

Mr. Webb: Yes, that is correct.

Mr. Crane: As Defendant's Exhibit No. 5, an interoffice memorandum, dated June 15, 1967, and a loan memorandum dated, June 14, 1967.

As Defendant's Exhibit No. 6, a personal financial statement, dated January 5, 1962.

The Court: These all go in chronological order?

Mr. Crane: No, I'm sorry, your Honor, they go back at the moment.

The Court: Is that January 5, 1962?

Mr. Crane: Yes, sir.

As No. 7, a financial statement, dated October 22, 1964.

As No. 8, a financial statement, dated May 18, 1966.

No. 9, a financial statement, dated June 22, 1967.

No. 10, a financial statement, dated December 9, 1968.

Defendant's Group Exhibit No. 11, which consists of 5 documents, an interoffice memorandum, dated December 9, 1970, which bears on it a notation on it dated, September 3, 1971, it is apparently two documents in one; a loan memorandum, dated December 9, 1970; a personal financial statement, dated December 8, 1970; and a credit advice, dated December 9, 1970.

As Defendant's Exhibit No. 12, a loan memorandum dated June 17, 1971.

Defendant's Exhibit No. 13, consisting of 3 documents, a loan memorandum, dated December 21, 1971; a credit

advice, dated December 21, 1971; and a personal financial statement, dated December 22, 1971.

Defendant's Exhibit No. 14, a loan memorandum, dated September 5, 1972 and a credit advice dated September 5, 1972.

As Defendant's Exhibit No. 15, a credit advice, dated January 15, 1973, and a demand note, dated January 15, 1973.

As Defendant's Exhibit No. 16, a financial statement, dated February 27, 1973. That has already been submitted as Plaintiff's Exhibit No. 2.

As Defendant's Exhibit No. 17, a loan memorandum dated March 2, 1973, and a credit advice, dated March 2, 1973.

As Defendant's Exhibit No. 18, a promissory—discount note, dated June 1, 1973.

As Defendant's Exhibit No. 19, a promissory note dated November 1, 1973, which I believe is Plaintiff's Exhibit—

Mr. Webb: That is correct. Plaintiff's Exhibit No. 9.

The Court: Is that it, Mr. Crane?

Mr. Crane: I think I have a few more.

The Court: 20 is the next number.

Mr. Crane: 20 is a Group Exhibit consisting of a letter dated May 15, 1974, to the bankrupt from Carol King; a letter to Mr. Bishop of the Northern Trust, dated June 21, 1974, from James Carmel; and a memorandum or letter from the bankrupt, Ben F. Garman, to Northern Trust Company, dated January 15, 1975.

These are all from the loan file, and those are all of the documents.

The Court: As I understand, Mr. Webb, you stipulate as to the foundation for these documents? Admit and received in evidence, thank you.

Mr. Webb: Yes—no. We stipulate as to foundation.

Mr. Crane and I both agree that some documents we feel are not relevant.

The Court: Just the foundation.

Mr. Webb: Foundation, thank you, your Honor.

The Court: There may be objection as to relevance and that is reserved by both parties as to the other's documents.

Mr. Crane: Your Honor, I see that a young lady has entered. If that is plaintiff's second witness, I would

Mr. Crane: Yes, I do.

The Court: How long do you think your examination will last?

Mr. Crane: 45 minutes, I would guess.

The Court: All right. Then we will take a recess until 3:45.

(There was a short recess, after which the following further proceedings were had herein, to wit:)

The Court: We will continue with the complaint of Northern Trust Company vs. Ben F. Garman.

Are you ready to proceed, Mr. Crane?

Mr. Crane: Yes, your Honor.

Cross-Examination

By Mr. Crane:

Q. Mr. Bishop, you testified that on December 9, 1970, you were in charge of and made a loan to Ben F. Garman.

Do you recall to your own knowledge at that time how much Mr. Garman received in actual proceeds of that money?

A. No, sir.

Q. Do you know whether Mr. Garman received the full amount of that loan?

A. No, sir.

Q. If I were to say to you that a loan memorandum indicates that part of that loan paid off a prior account at Northern Trust, would that be correct?

A. I would have to look at the credit file to refresh my memory.

Q. Mr. Bishop, I shew you—would you mark this as—

The Court: You mark it, please.

It makes it go faster. In Federal Court, there is no magic to marking.

Mr. Crane: I think I have already indicated a date to this document as part of Defendant's Group Exhibit No. 11.

The Court: All right. You can make that "A", "B", "C", just tell me which one it is.

Mr. Crane: It is number A of Defendant's Group No. 11.

The Court: What document is it?

Mr. Crane: Purporting to be an interoffice memorandum dated December 9, 1970.

By Mr. Crane:

Q. Would you look at that document, Mr. Bishop, and tell me whether or not that bears your initials and your name on it?

A. Yes, sir, it does.

Q. Did you prepare that document?

A. Yes, sir.

Q. Would you read the portion of the document after the parties to whom it is addressed that says, "Re Ben F. Garman."

Would you read that for us?

A. Yes, sir. This is dated December 9, 1970.

(Reading:)

"I agreed to lend Mr. Garman $5,000 at 8 percent, repayable over a 14 month period.

"The purpose of the loan is to pay off his ACR line of approximately $3,000 and the remainder for personal expenses.

"Agreed upon repayment is as follows:

$1,000 within 183 days;

$1,500, 90 days beyond that point;

> $1,500 within 90 days of that date;
> and the remaining $1,000 90 days after that date."

Mr. Crane: That is sufficient.

The Witness: I have some other notes on there which change the repayment schedules somewhat.

By Mr. Crane:

Q. Would you please tell the Court what the ACR Account to be paid off is that you are referring to?

A. Those letters stand for "Automatic Cash Reserve" which is an overdraft facility on a checking account under which Mr. Garman owed the bank $3,000.

Q. When you made this memorandum of December 9, 1970, did you have the entire loan or credit file relating to Mr. Garman at Northern Trust Bank before you?

A. Yes, to the best of my knowledge.

Q. Did you have occasion to review that loan file?

A. Yes, sir.

Q. Do you know how many loans Mr. Garman had with the Northern Trust Company, how long it had a line of credit up to December 9, 1970?

A. Without checking the credit file, I don't know how long he had that ACR line.

Q. If I were to tell you that the credit file reflects an initial loan of January of 1972, would that appear to be correct?

A. No, sir.

The Court: Not '72.

Mr. Crane: '62, I'm sorry.

The Witness: '62? I said "No," in '72, because I had made loans prior to that.

I could verify that, I suppose, by looking through the credit file. It sounds reasonable that he could have borrowed back as early as '62.

By Mr. Crane:

Q. Were you aware of Mr. Garman's history or prior dealings with the Northern Trust on December 9, 1970?

A. Yes, I was aware of his relationship with us, the bank.

Q. Were you aware of the fact that Mr. Garman had approximately, at least two loans, for a period of 10 years or from January 1962, through December 9, 1970, two loans each year up to that time?

A. Am I aware of that today, or was I aware at the time?

Q. Are you aware of it now?

A. Not without rechecking the credit file.

Q. You did say that you were aware of his prior loans at the time that you made the loan in December, 1970?

A. I stated that I was aware of his relationship with the bank.

Q. On the bottom of that same form we have just looked at, the Defendant's Group Exhibit 11-A, there is a notation beginning 9/3/71.

Would you read that to the Court and explain what that meant?

A. This is in my handwriting. It is a note at the bottom of this typewritten memo that I read earlier. My handwritten note is dated 9/3/71 which says:

(Reading:)

"I agree to extend this loan for an additional 90 days—"

Then it has my initials, and below that I say:

"The balance as of 9/3/71 on the previously mentioned $5,000 loan is now $3,500...."

Below that I have noted:

"Renew on 9/10/71 for 90 days—"

Below that I have:

"Pay $1,500 on 12/10/71, and the balance of $2,000 on 3/10/72."

Q. Thank you.

Does that indicate or does that, to the best of your knowledge, mean that as of 9/3/71 that Mr. Garman's loan was extended for an additional 90 days?

A. Yes, sir.

Q. And does that mean that on December 10, 1971, Mr. Garman received an additional $1,500?

A. No, sir, that is a payment.

Q. Is that a payment?

A. Yes, sir.

Q. Did you receive any other documents from Mr. Garman on September 3, 1971, at the time of the extension of that loan?

A. Well.

Q. To your knowledge?

A. Not to my knowledge.

Q. Did you ask Mr. Garman for an additional personal financial statement form on September 3, 1971?

A. No, sir, not to my knowledge.

Q. Mr. Bishop, I now show you what is marked as Defendant's Exhibit No. 12, purporting to be a loan memorandum dated June 17, 1971, and ask you if that bears a facsimile of your signature and whether you prepared that memorandum?

A. Yes, sir. This is a copy of my signature; and the entire document, where it is handwritten, is my handwriting.

Q. And, would you tell the Court what loan that memorandum refers to?

Did that extend an original loan for another period of time?

A. Yes, sir. I have under purpose of loans, see loan memorandum dated 12/9/70 in the credit file.

Q. At that time, do you recall whether you took any additional documents or personal financial statements?

A. I recall that I did not since I had a 12th of December, '70 statement in my hands.

Mr. Crane: I ask that last portion of the answer be stricken, your Honor. That was not responsive to the question.

The Court: Yes?

Mr. Webb: Your Honor, maybe I misunderstood the question.

I thought it was completely responsive to the question.

The Court: So did I, Mr. Crane.

Therefore, your motion is denied.

Mr. Crane: Your Honor, I ask at this time that Defendant's Group Exhibit No. 11 and Defendant's Exhibit No. 12 be admitted into evidence.

The Court: Do you have any objection?

Mr. Webb: No, normally exhibits cannot be admitted on cross-examination.

The Court: That is correct.

Mr. Webb: I would state to the Court that simply means that Mr. Bishop would have to be called back again.

The Court: Not necessarily, if the proper foundation is made during the examination at the time, if it comes to pass, that the defendant goes ahead.

Then he could ask that they be admitted without Mr. Bishop being here.

Mr. Webb: I have allowed this witness to testify from the contents of these documents when they really aren't in evidence and I want to state for the record, I tend not to object so that it will make things speedier; I would ask the Court then to withhold ruling until Mr. Crane's chance to present his evidence when he can offer the exhibits and if they are relevant, it will not be necessary to call this witness back again.

The Court: All right.

So at this time, the Court will not rule on the admissibility of Defendant's Group Exhibit No. 11 or Defendant's Exhibit No. 12.

By Mr. Crane:

Q. Mr. Bishop, I call your attention to the loan made by Mr. Garman on December 21, 1971, about which you have testified.

Do you recall how much cash Mr. Garman was given at that time?

A. Would you repeat the date of that loan?

Q. December 21, 1971?

A. Well, there have been several notes here. I believe that was the one for $4,000 but I would like to take a look at the note to confirm that.

Mr. Crane: Your Honor, I have marked this document Defendant's Group Exhibit No. 13 and this is document A, a loan memorandum.

Mr. Bishop, I ask you if that loan memorandum was prepared by you and if that is in the same condition it was when you prepared it?

A. It appears to be other than the blue ballpoint notations at the bottom.

Q. That I have just written, Defendant's Group Exhibit?

A. Yes, sir.

Q. And, according to that memorandum, how much money did Mr. Garman receive on December 21, 1971?

A. You can't—

Q. Allow me to rephrase that, Mr. Bishop.

There is a section there that indicates $2,000 old loan, $4,000 new loan, would that be correct?

A. Yes, sir, but when you asked me how much he received, if it was a discounted note, he would get 3,900 and some odd dollars.

Q. So, the figures are approximate, is that correct?

A. Yes, sir.

Q. But, that indicates there was an existing balance at that time?

A. Yes, sir. Based on that, he received approximately a little under $4,000.

Q. And, the total amount of the note was how much, according to that document?

A. Well—

Q. What's the figure that you have written there?

A. $4,000.

Q. Do you have a total?

A. The total is 6. That would be the total of two notes, or it could be the total of just one note.

If we paid off the old $2,000 note, then I would like to check the file, but I would assume the new note is 6.

Since I just went over a $4,000 note, dated December 21, 1971, I conclude from that that there was an additional $2,000 note outstanding, the total indebtedness to the bank being $6,000.

Q. It could have been several notes?

A. I think there were two in this case.

Q. But the total indebtedness if I understand you was $6,000?

A. Yes, it was.

Q. And, at the time this $6,000 loan was made on December 21, 1971, and I show you Exhibit B of Defendant's Group Exhibit No. 13 For Identification purporting to be a credit advice, and ask you what that specific credit advice relates?

A. This relates that we credited what appears to be Mr. Garman's checking account 418137 at the Northern Trust Company.

Q. And, on what date was that account credited?

A. December 21, 1971.

Q. And, on December 21, 1971, did you take an additional personal financial statement from Mr. Garman during that date?

A. I requested an additional financial statement.

Q. Did you take one was the question that I asked you, on that date?

Did Mr. Garman present you on December 21, 1971, with an additional personal financial statement?

A. No, sir.

Q. Did he present you with an additional personal financial statement within the week prior to December 21, 1971?

A. No, sir.

Q. Now, I believe you testified, Mr. Bishop, that in January of 1973, Mr. Garman was given the proceeds of an additional loan for $15,000, is that correct?

A. Yes, sir.

Q. And, in January, 1973, were you the officer who approved that loan, if you recall?

A. Yes, I believe I was.

Q. And, in January 15, 1973, did you ask for or receive from Mr. Garman an additional personal financial statement?

A. I asked for an additional personal financial statement.

Q. Did you receive one at that time?

A. No, sir.

Q. Prior to this loan?

A. No, sir.

Q. And at the time the proceeds of the loan were credited to Mr. Garman's account, January 15, 1973, did you have an additional personal financial statement from Mr. Garman?

A. No, I had one dated December 22nd.

Q. No, I asked you if you had one dated that date?

A. Dated that date?

Q. Yes.

A. No, sir.

Q. Did you request one of Mr. Garman on that date?

A. Yes, sir.

Q. Did he give you one on that date?

A. No, sir.

Q. Did you proceed to transfer the money to his account on that date without the personal financial statement?

A. Based on his last financial statement that I did have.

Q. I am just asking you, did you credit him the $15,000?

A. Yes, sir.

Q. Calling your attention to March 2, 1973, I believe you testified that at that time you had been transferred, or were not in the bank, and that a Mr. Pero—

A. It's Perry R. Pero, P-E-R-O.

Q. Had authorized an additional loan to Mr. Garman, is that correct?

A. I testified that having looked at the note, it had his handwritten signature on it which indicates to me that he had approved it.

Q. Were you personally familiar with that loan on March 2, 1973?

A. No, I wasn't.

Q. Mr. Bishop, I show you a document marked Defendant's Group Exhibit 17 A, a loan memorandum dated March 2, 1973, and ask you based on this loan memorandum what was the amount of the loan made to Mr. Garman on March 2, 1973?

A. $5,000.

Q. And, what was the total amount of Mr. Garman's indebtedness to the bank on that date?

A. After that loan, $30,000.

Q. This is the loan that was made by Mr. Pero, is that correct?

A. Yes, sir.

Q. Now, would you please read for the Court, the comment written here as "Purpose of Loan"?

A. Yes, sir, it reads:

(Reading:)

"Cover miscellaneous expenses of moving into new home.

Mr. Bishop had agreed to make this loan prior to his transfer from the Eastern Division.

"If Mr. Garman has not sold his current home by June 1, 1973, I have agreed to renew the loan to 9/15/73."

Then, it just says "credit account, checking account."

Q. Do you recall that being your instructions?

A. No, sir.

Q. And, there was no additional personal financial statement requested or received of Mr. Garman on March 2, 1973, is that correct?

A. I have no idea.

Q. You have—there is none introduced by you, nor do we know. To your knowledge, do you know whether you asked him or he was asked about it?

A. I have no idea.

By The Court:

Q. Were you in charge of Mr. Garman's account on that date?

A. No, sir.

Q. When had you left?

A. Around January 12th, the 15th, about the middle of January.

Q. Of '73?

A. Yes, sir.

Q. Thank you.

By Mr. Crane:

Q. Mr. Bishop, did you ever take charge of Mr. Garman's account again after the date you just testified you left?

A. I would have to say that I believe there was a period of time following March, 1973, when Mr. Garman's loan

was administered by someone working for me in my new assignment.

In other words, this loan was moved from this Eastern Division referred to earlier to one of our Metropolitan lending divisions in which I was in charge.

By The Court:

Q. You had no personal knowledge of the loan administration during that period?

A. I think I would have, your Honor.

I may not have made the loans myself, but I would have been aware that he was borrowing from us.

By Mr. Crane:

Q. During the period of time of March, 1973, to the present time, did you ever personally consult with or talk to Mr. Garman relative to the account at the Northern Trust Company?

A. I think I probably did.

Q. Did you do that on the occasion where there was any loan made or additional monies requested?

A. No. It was an attempt to get some of it back.

Q. And, you contacted him, in other words, for collection purposes on old loans?

A. I don't remember the specific dates. I think I have had conversations with Mr. Garman subsequent to my direct lending to him with regard to outstanding loans.

Q. The additional loans that were made in March of '73, and the notes signed in June of '73, and November of '73, if I understand correctly, would have been either approved by some other officer or directly handled by someone else.

Somebody else would have been in contact with Mr. Garman?

A. That is correct.

Q. You weren't personally involved in the signing of the documents or a discussion of the extensions, or the renewal notes, with Mr. Garman?

A. Would you rephrase that question?

Q. Were you personally involved—were you present when Mr. Garman executed any of these notes?

A. Not to my knowledge, but I could have been.

I know Mr. Garman and if—

The Court: There is no question pending, sir.

By Mr. Crane:

Q. Mr. Bishop, I believe you testified that Mr. Garman did not list on his financial statements which you submitted as your exhibits the Exchange National Bank as a creditor, is that correct?

A. Yes, to the best of my knowledge.

Q. Do you know whether Mr. Garman had ever listed the Exchange National Bank on prior financial statements?

A. I do not know.

Q. Do you know whether the bank was aware of his relations with the Exchange National Bank prior to that time?

A. I was not when I was lending him money.

Q. If I were to tell you that the loan file contains memorandums referring to a loan at Exchange National Bank, would that be accurate.

You wouldn't know. I withdraw that question.

I show you a document labeled Defendant's Group Exhibit No. 1 A, dated January 12, 1962, which is part of the loan file, and ask you to read for the Court just that sentence right after "Re Ben Garman".

Mr. Webb: Your Honor, I am going to object on the grounds of relevancy.

The witness already testified he had no knowledge of the matters that took place in 1962.

First of all, it is clearly outside the scope of the direct, but more important than that, I would rather base it on the grounds of relevancy from the standpoint that it did

not have any relevancy to this witness' testimony as far as the events which he testified took place between the years 1970 and 1973.

He is now showing a document prepared by a third party which he did not prepare and asking questions about it.

The Court: As I understand it, Mr. Webb, this was part of the file.

I think the proper question to ask would be whether Mr. Bishop had knowledge of this particular document.

Mr. Crane: Well, your Honor, Mr. Bishop testified that he—

The Court: Well, you asked him to read from it. I think if you—

Mr. Crane: Mr. Bishop testified that he reviewed the loan file.

The Court: Surely, and you can ask him in his review whether he saw this document.

By The Witness:

A. No, sir, I don't recall it.

By Mr. Crane:

Q. Mr. Bishop, do you recall seeing a loan document dated November 27, 1963 interoffice memorandum when you reviewed the loan file?

The Court: While you are reading that, I should say that I am sustaining Mr. Webb's objection.

By The Witness:

A. I would have to answer by saying that here in 1977 I may have read this before.

I can't say specifically whether I have read this before or not. I may have but I don't remember. I didn't join the bank until 1966.

By Mr. Crane:

Q. You did review the loan file, is that correct?

A. Yes, I have reviewed the file.

That does not mean every single item in there. I was interested in the last couple of years when I was looking.

Q. Do you recall, Mr. Bishop, in your review of the file whether you came across or became familiar with a personal financial statement signed by Mr. Garman and dated October, 1964?

The Court: Have you given that an exhibit number, I don't recall?

Mr. Crane: No, I didn't.

By The Witness:

A. I do not recall whether I have seen that particular personal financial statement before or not.

Mr. Crane: That was Defendant's Exhibit No. 7, your Honor.

The Court: It has already been marked then.

By Mr. Crane:

Q. Mr. Bishop, you testified that when Mr. Garman made the loan of December 9, 1970, you reviewed his personal financial statement at that time?

A. Yes, sir.

Q. I believe you identified that personal financial statement as Plaintiff's Exhibit No. 2. Did you go over the items on this personal financial statement with Mr. Garman personally?

A. I don't think so.

Q. I show you what has been marked, this is a copy of a document marked Plaintiff's Exhibit No. 2, and ask you if you see under the section "Annual Income" "Other Income Counseling Fees?"

A. Yes, sir. I do.

Q. Did you ever ask Mr. Garman what that related to?

A. No, sir. I did not.

Q. Did you ever, at any time, instruct Mr. Garman in the filling out of this financial statement?

A. I don't believe so.

Q. Did you ever indicate to him what this financial statement was to be taken for?

A. I believe so.

Q. Did you ever tell him what his financial statement had to include or not include?

A. Oh, yes, sir.

Q. Do you know when you did that?

A. Specific date, no, sir, I don't.

Q. Mr. Bishop, is it accurate to say that in the course of Mr. Garman's dealing with the bank, from January of 1962, through November of 1973, you were personally involved with the making of the loan on December 19, 1970, and the loan January 15, 1973, and the extensions of loans in '71, is that correct?

Mr. Webb: Your Honor, I am going to object.

That question misstates the evidence as to what loans he was involved in.

Mr. Crane: It probably does.

The Court: I heard Mr. Crane say, "It probably does," therefore, the objection is sustained.

By Mr. Crane:

Q. Mr. Bishop, were you at the bank when Mr. Garman initially opened or had a loan with the Northern Trust Company?

A. I don't believe so.

Q. Are you at all personally familiar with any circumstances surrounding the opening of the loan at the Northern Trust Company?

A. I would say no.

Q. Are you familiar with any of the loans made by Mr. Garman or extensions thereof prior to December 9, 1970?

A. I would say probably so. Maybe some of the ones that may have been made in '66, '67, after I joined the bank because the loans were in the group that I happened to be a part of.

Q. Were you in charge of those loans at that time?

A. No, sir.

Q. Did you negotiate or were you personally involved in the making of those loans?

A. I think the first one I negotiated was the December 9, 1970, one.

Q. And did you familiarize yourself from the loan and credit file with all of the past loans and documents relating to his account?

A. No, sir. I would have only gone back a couple of years.

Q. Mr. Bishop, the only loan that you testified to in which a personal financial statement was taken contemporaneously with the loan was the one on December 9, 1970, is that right?

A. I think that's a fair statement.

Q. In making the loan to Mr. Garman on December 9, 1970, would you have reviewed this past loan record as a factor in making that loan?

A. At least the last few loans plus his most recent financial statement.

Mr. Crane: I have no further questions.

The Court: Do you have any further questions, Mr. Webb?

Mr. Webb: Just one or two, your Honor.

The Court: Surely.

By Mr. Webb:

Q. Mr. Bishop, I believe in response to one of Mr. Crane's questions, you stated that in December, 1970 you would not have reviewed the entire credit file but only the last couple of years as far as Mr. Garman's history with the bank is concerned, is that correct?

A. Yes, that's what I said.

Q. Would you tell the Court what the reason for that would be as to why you would only be interested in his most recent financial condition?

Mr. Crane: I object to that, your Honor.

He has already testified as to what he did at that time.

The Court: Well, we have to go into the state of mind of a person.

I think it is proper to have testimony as to the reasons that he would or would not do something at the time he was making his decision.

Therefore, the objection is overruled.

By The Witness:

A. I would only have gone back a couple of years as I stated principally because I was interested in what Mr. Garman owed the bank at the time I was considering the first loan I made on December 9th, what his current financial condition was not his financial condition several years ago, what his current income was as evidenced by the financial statement, so that I could judge as to his ability to repay the loan.

Other than for my information, general interest, there was no particular reason to examine the file in detail more than the last couple of years.

By Mr. Webb:

Q. Thank you, Mr. Bishop. Now, one other question.

Mr. Crane in his questioning asked you if in fact that December 9, 1970, loan was the only loan where you had contemporaneously had a financial statement, I believe it was dated one day before that on December 8th.

Mr. Crane asked you a series of questions about the dates on these financial statements. I am going to ask you based on your experience as an officer of the Northern Trust Company, would you tell the Court what in your judgment would be considered for the purposes of making a loan or additional loan to a customer, a current financial statement on which you could rely?

Mr. Crane: I will object to that as to what the practice or his normal—

Mr. Webb: I think he opened this up with his questions as to whether it was reasonable for him to rely upon certain statements that were in the bank's files at the time that he made certain loans after December, 1970.

So, I think that his judgment and reasonableness as far as his reliance is concerned has been presented to the Court.

Mr. Crane: I never asked if it was reasonable. I asked if he reviewed the files.

The Court: That's right. There has been no issue as to reasonableness.

I think that is ultimately an issue that will be decided by the Court, but the form of the question is objectionable and the objection is sustained.

Mr. Webb: To that line of inquiry?

The Court: Not to that, never to a line of inquiry. You may always go ahead until such time as someone says, "All right, you have asked that before, Mr. Webb."

By Mr. Webb:

Q. Well, let me ask you this: Did you consider the financial statements that you relied upon for the years 1970, 1971, 1972, and 1973 to be current for your specific purpose in loaning money to Mr. Garman?

Mr. Crane: I will object to that, your Honor, categorizing statements he relied on.

The Court: I think that is argumentative. That is a fact that must be determined by the Court regardless of whether this officer may feel it is current.

Mr. Webb: I have no further questions, your Honor.

By The Court:

Q. As to this statement that was made on December 8, 1970, you said you looked back to the file for a couple of years, did you verify Mr. Garman's employment at that time?

A. No, sir, because I was familiar with the company and his superior in Chicago. I knew he was employed by that firm so I did not have to verify it.

Q. Did you verify how many dependents Mr. Garman had at that time?

A. No, sir. That was essentially irrelevant based on his income level and financial condition in terms of our loan.

Q. His net worth is the basis on which you make all of these decisions?

A. That coupled with the income, current indebtedness, in other words, his cash flow, his ability to repay the loan.

Q. All right. I am interested, and you will have to bear with me while I formulate some of these.

The cash flow shows $37,000. Is that gross income or net income?

A. That was the gross, I believe, yes, sir.

Q. You have to take out taxes from that?

A. Yes, living expenses and mortgage and so forth.

Q. Don't you come to some judgment, or some figure that you look to as to the monies that are available to repay any indebtedness?

A. Yes, sir.

Q. Did you, as to the December 8, 1970, statement?

A. Yes, sir.

Q. What was that figures?

I have a copy of here, that has been identified as Exhibit No. 2, you have $37,000 as total income?

A. Yes, sir.

Q. His net worth—I suppose what I am getting into, Mr. Bishop, the net worth here all seems to be tied up in a particular house?

A. Yes, sir, 39 from 75, the bulk of it.

Q. That is not very liquid?

A. No, sir, but with a $37,000 income, there should be sufficient monies to repay the loans.

Q. How much money do you think from that he had to repay the loans in 1970?

Why didn't you get a statement as to his monthly mortgage payment. It is not there, is it?

A. No, sir.

Q. What the school costs; do his children have school expenses?

A. That is an excellent idea.

Q. This is what I look to. I don't consider that necessarily a financial statement because it doesn't show the monthly income and expenses.

It may be a financial statement in the sense that it may be assets and liabilities, but somehow these are misleading, even if we assume that they were stated accurately as to what a cash position of a person is and what types of loans he can handle.

A. Of course, when we talk with a borrower, we set up a repayment schedule that meets his abilities that indicates quite a bit in terms of funds—

Q. These weren't monthly payments?

A. No, sir.

Q. It doesn't show that he has any cash on hand. He had an overdrawn checking account. So, where do you think the cash is going to come from to pay these loans?

A. His monthly or bimonthly payments from the company he work for.

Q. How do you know for any monthly or bimonthly payment that there would be funds available to pay the loan?

A. From the statement?

Q. Yes.

A. You can't tell from the statement.

Q. That's right.

The Court: Did you wish to ask Mr. Bishop any questions?

This bothers me on these types of statements.

Mr. Crane: Your Honor, may I recall Mr. Bishop later and ask just a few more questions?

You have asked him about the company that Mr. Garman is employed by which I think requires, for the benefit of the Court, an explanation from Mr. Bishop.

The Court: Why? I was just wondering if he verified this from the file or some other place, that is all.

It does bother me, Mr. Webb, and— Do we have any more quetsions of Mr. Bishop?

Mr. Crane: I do.

The Court: Of what basis?

Mr. Crane: I would like Mr. Bishop to tell the Court what company Mr. Garman does work for.

The Court: New York Life. It says on the financial statement.

Mr. Crane: And whether New York Life is a major depositor in an account with the Northern Trust Company?

The Court: It may very well be.

Mr. Crane: And whether Mr. Garman was given a loan at the request of the New York Life Insurance Company?

By The Witness:

A. Not by me.

The Court: There is an answer.

By The Witness:

A. In other words, any loans I made were not requested by New York Life. They were requested by Mr. Garman.

The Court: Do you have any more questions of Mr. Bishop?

Mr. Webb: I have no further questions, your Honor.

The Court: Do you have any other questions?

Mr. Crane: I have no questions.

The Court: All right, thank you, Mr. Bishop.

You may talk to Mr. Bishop afterwards, after my comments but this bothers me that you expect a person to be able to save $5,000 in a period of time or make payments of $1,000 in a particular time.

There is no way to analyze his income to determine whether he will have the cash on hand.

By The Witness:

A. Since your Honor is interested in that particular point, and I think it is a good one, I would tell you that on normally installment loans that information is available and—

The Court: Yes, I know it is.

By The Witness:

A. On the larger loans where the borrowers of more substantial means is indicated by his financial statement, I think that perhaps we have been somewhat remiss in not taking those things, specific expense numbers, down.

The Court: It seems to me that whether there is an installment loan or a loan like this, there has to be some way to judge that.

Mr. Webb and I will work that out later on.

Thank you, Mr. Bishop.

(Witness excused.)

The Court: Do you wish to call Ms. King?

Mr. Webb: I spoke to her and told her that she might have to come back tomorrow because of the timing and she said that was fine.

The Court: How much time will it take?

Mr. Webb: Well, my direct is not very lengthy. I don't know how long cross is.

The Court: Call her in.

Mr. Crane: I couldn't be very long.

The Court: Why don't we try to get this part of the